Supreme Court, U. S.
FILED
FEB 4 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-973

E. B. BURGETT AND WINNIE BURGETT, *Petitioners*

V.

THE FEDERAL LAND BANK OF WICHITA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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V.

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions are stated in the Petitioner's Brief.

JURISDICTION

Respondent maintains that this Court lacks jurisdiction as the issues raised in the Petition were not timely presented to or ruled upon by the New Mexico Supreme Court.

QUESTIONS PRESENTED

1. Whether the constitutionality of Rule (4) (e) (1) of the New Mexico Rules of Civil Procedure, which permits service of process by posting a copy of the summons and complaint at the most public part of defendant's usual

place of abode was properly raised in the New Mexico Supreme Court so as to provide jurisdiction for this Court to review the New Mexico Supreme Court decision?

2. Whether Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure, which permits service of process by posting a copy of the summons and complaint on the most public part of the premises at the usual place of abode of an absent defendant complies with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The jurisdictional provision involved is 28 U.S.C. Section 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, May be reviewed by the Supreme Court as follows:

> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, June 25, 1948, c.646, 62, Stat. 929.

The remaining provisions involved are as set forth in Petitioners' Brief.

STATEMENT OF THE CASE

On November 18, 1975, The Bank filed its complaint against the Burgetts. On November 19, 1975, Emmett B. Owens attempted to serve process on the Burgetts at a house owned and lived in by them located between Cloudcroft and Mayhill, New Mexico. The Burgetts lived and resided in this house for a great number of years and at the time of attempted service by Mr. Owens, were still residing in the house, although temporarily in Artesia, New Mexico.

When Mr. Owens attempted to serve process, he found no one at the house located between Cloudcroft and Mayhill, New Mexico. He personally served Everett Dale Burgett, who was quarantor of the promissory note secured by the mortgage being forclosed. He is the son of E. B. Burgett and Winnie Burgett, and their agent and manager of their business being operated from the premises and property being foreclosed. Mr. Owens asked Everett Dale Burgett where his parents could be found. He refused to disclose his parents whereabouts, giving no reason for his refusal.

Mr. Owens then went to Cloudcroft, New Mexico, and asked Rex Briscoe, a police officer, where the Burgetts lived. Mr. Briscoe directed Mr. Owens to the house between Cloudcroft and Mayhill, New Mexico where the Burgetts lived and which they owned. Officer Briscoe informed Mr. Owens that he was sure the Burgetts still resided at this house that he had described because he had seen E. B. Burgett recently at the post office in Cloudcroft, New Mexico. Upon returning to the Burgett house, Mr. Owens determined the most public door of the Burgett domicile and home. He knocked on the door and finding no one present, he attached two copies of the Summons and Complaint to the back door of the Burgett's home.

On January 20, 1976, the default of E. B. and Winnie Burgett was entered by order of the District Court of Otero County. On July 15, 1976, summary judgment was entered against Everett Dale Burgett, who appeared pro se. On August 5, 1976, the Final Decree of the District Court was entered granting respondent default judgment against the Burgetts and summary judgment against Everett Dale Burgett. On September 10, 1976, a motion to set aside the judgment was filed predicated on the grounds that "no proper service of process was ever had on the Burgetts", claiming they no longer resided at the house between Cloudcroft and Mayhill, New Mexico, on the date and time of service.

After an evidentiary hearing on the Motion, the District Court made findings of fact and conclusions of law denying the Burgetts' motion to set aside the judgment and holding that the Burgetts were properly served. The findings of fact and conclusions of law relied on by the District Court included: the Burgetts were each served process on November 19, 1975, by attachment of two sets of summons and complaints, enclosed in a clear plastic bag, to the most commonly used door of the premises and usual place of abode of E. B. Burgett and Winnie Burgett; that the Burgetts were temporarily in Artesia, New Mexico; that Everett Dale Burgett was the son, agent, and manager of the business affairs of E. B. Burgett and Winnie Burgett, and had been responsible and attended to all the legal and business affairs of E. B. Burgett and Winnie Burgett; and conclusions of law that services of process was properly made upon both the Burgetts by posting two summons with copy of complaint attached to the most public door and most public part of the premises of the Burgetts; a conclusion that Everett Dale Burgett, son, manager and agent for the Burgetts, was personally served with a summons with a copy of the complaint attached, and had full knowledge of

the action on file herein.

Following denial of the motion, the Burgetts appealed to the New Mexico Supreme Court. The Burgetts' appeal specifically challenged all of the District Court's findings and conclusions of law, arguing that there was not substantial evidence upon which the Court had based its conclusion that service of process was properly made on them.

The decision of the Supreme Court of New Mexico affirming the decision of the District Court was without opinion, merely holding that there was substantial evidence supporting all of the findings and conclusions made by the trial court. See Appendix D of Petitioners' Brief. The Burgetts' Motion For Rehearing was also denied by the Supreme Court of New Mexico, again without opinion.

The Burgetts petitioned this Court to grant certiorari (No. 77-391). It was in their Petition For A Writ of Certiorari that the Burgetts for the first time raised the question of the constitutionality of Rule (4) (e) (1). See Petitioner's Brief page 6. The denial of the Writ is reported at 434 U. S. 966 (1977).

The Burgetts then moved a second time, in the State District Court to set aside the default judgment, this time basing their Motion on an alleged lack of due process provided in the New Mexico procedure. The District Court concluded that the New Mexico posting procedure did, as a matter of law, comport with due process. The District Court also held that its prior decisions were res judicata "as to all facts surrounding substituted service of process on defendants in this case."

On the Burgetts' appeal, the New Mexico Supreme Court affirmed the decision of the District Court, stating, "We believe that our previous affirmance serves as res judicata against further claims based on lack of jurisdiction. *American Surety Company v. Baldwin*, 287 U. S.

156 (1932)." See Appendix H to the Petitioner's Brief.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED BY PETITIONERS WERE NOT TIMELY RAISED IN THE NEW MEXICO COURTS, THEREFORE THIS COURT HAS NO JURISDICTION TO GRANT THE WRIT.

The question of whether Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure, as it relates to substituted service, violates the due process clause of the Fourteenth Amendment to the United States Constitution was not timely presented to the New Mexico Supreme Court, and was not considered by it. Therefore this Court has no jurisdiction to review those questions.

Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C. Section 1257 (3). It is a precondition to the existence of jurisdiction under this section that the federal question upon which review is sought was presented to and ruled upon by the state court. *Cardinale v. Louisiana*, 394 U. S. 437 (1969). The assertion of a federal right must have been clear. This Court's jurisdiction does not arise from mere inference. *Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655 (1897). Rule 23 (1) (f) of the United States Supreme Court places the burden on Petitioners to show the federal questions were raised, how they were raised and the manner in which they were passed upon by the state court. Petitioners have not met any of these requirements.

The order of the New Mexico Supreme Court which Petitioners want this Court to review could not be more clear. Its decision affirming the New Mexico District Court's denial of Petitioner's second motion to set aside the judgment against them was not based on any consideration of the validity or invalidity of Rule 4 (e) (1).

The affirmance of the New Mexico Supreme Court was based on the determination that "... our previous affirmance serves as res judicata against further claims based on lack of jurisdiction." Citing *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932). See Appendix H of Petitioner's Brief. The Court's previous Order was based on a finding of substantial evidence and likewise did not involve any consideration of the constitutional issue. See Appendix D of Petitioner's Brief. The decision of the New Mexico Supreme Court was thus based on an adequate and independent state ground not reviewable by this Court. *Fox Film Corp. v. Muller*, 296 U. S. 207 (1935). *Berea College v. Kentucky*, 211 U. S. 45, 53 (1908).

Petitioners do not point to anything in the record to indicate that any federal questions were timely raised at trial, on appeal to the New Mexico Supreme Court, or in the Motion for Rehearing filed in the New Mexico Supreme Court. Their only claim is that since their constitutional argument only crystalized as a result of the Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977) it would be an abuse of the doctrine of res judicata to foreclose the Burgetts from their present constitutional challenge. This argument is promptly contradicted on the very next page of their brief where they argue that this Court's prior decisions such as *Mullane v. Central Hanover Bank and Trusts Co.*, 339 U.S. 306 (1950) allegedly indicated that New Mexico's posting procedure is constitutionally untenable. Futhermore this is the first time any reference has been made to *Shaffer v. Heitner*, supra, despite the fact a constitutional challenge was raised in their first Petition for A Writ of Certiorari.

Even assuming arguendo that *Shaffer v. Heitner* broke relevant new ground, Petitioners cannot escape the effects of res judicata. Using Petitioners' theory, every time a new decision of the Court is announced, any case to which it might apply can be reopened for further

consideration. It is precisely to avoid that situation that the doctrine of res judicata developed. There must at some point be an end to litigation as the present case clearly demonstrates. The case law is uniform on this point. See *American Surety v. Baldwin*, supra; *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, (1940) (Bondholders who had chance to challenge constitutionality of a provision of Bankruptcy Act but who failed to do so cannot afterwards seek relief from decree on grounds provisions declared unconstitutional in a later proceeding); *Douglas-Guardian Warehouse Corporation v. Posey*, 486 F.2d 739, 742 (10th Cir. 1973). (Where Appellant failed to challenge constitutionality of Colorado replevin law, court would not apply rule of *Fuentes v. Shevin*, 407 U. S. 67 (1922) striking down such statutes retroactively. Appellant is bound by the doctrine of res judicata); Moore's Federal Practice, Vol 1.B, Section 0.415, pp.2051-2058.

This Court will not and cannot pass upon the constitutionality of a state rule before the state courts have had an opportunity to do so. *Adler v. Board of Education*, 342 U. S. 485, 496, (1952), and *N.L.R.B. v. Seven-Up Co.*, 344 U. S. 344, 350 (1953). New Mexico's rules for service of process are fundamental to its entire system of administration of justice and any attack on its constitutionality should be made in New Mexico's own courts in a clear, direct manner so that the issue can be fully and thoroughly brief to the extent such an important question warrants.

Furthermore, as Petitioners point out, the New Mexico Supreme Court amended Rule 4 (e) (1) effective October 1, 1979. See Petitioners' Brief page 4. If a case is to be reviewed by this Court, it should come from one of the states still having an equivalent rule or from some previously filed New Mexico case where the question was properly raised.

There was in fact no federal question decided in this case in the New Mexico Supreme Court and there is nothing for this Court to review. The Petition should be denied.

II. PETITIONERS THEMSELVES WERE NOT DEPRIVED OF DUE PROCESS OF LAW SINCE SERVICE MADE UNDER RULE 4 (e) (1) PRIOR TO AMENDMENT COMPLIED WITH DUE PROCESS.

Petitioners rely heavily on *Shaffer v. Heitner*, supra. While that case is important, it is important for issues not involved in this case. *Shaffer v. Heitner* dealt with due process considerations involved in determining when a state court has jurisdiction over an out of state defendant based on the presence of property owned by the defendant in the state. The answer was that the minimum contacts test of *International Shoe Co. v. Washington* 326 U. S. 310 (1945) applies even to in rem proceedings. There is no out of state defendant in the present case. The present case is not concerned with minimum contacts. The Petitioners (defendants below) have at all relevant times been physically present in New Mexico as has the property which is itself the subject of the lawsuit. The issue involved is the adequacy of notice provided by Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure prior to amendment i.e. is it reasonably calculated to apprise a defendant of the pendency of a suit.

Mandatory personal service of process is the only method of guaranteeing actual notice of a law suit against an adversary. Such a requirement would work a great injustice on those seeking the courts to settle disputes and achieve legal remedies. Causes of action could be easily thwarted by defendants avoiding personal service of process. Such is not the law now, nor has

it ever been the law. *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907).

Due process of law as required by the Fourteenth Amendment to the United States Constitution demands that service of process in any proceeding is notice that is reasonably certain under all the circumstances to inform the defendant. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306 (1950).

Each case that involves substituted service of process must be examined in its entirety to determine all the facts and circumstances of the method of service that was used, with any decision as to satisfactory of unsatisfactory adherence to due process requirements to be made upon the evidence found by the trier of fact. Where substituted process on residents of the forum has been used, each case has been examined by the appellate courts of the state[1] and federal[2] courts to determine if, as a factual matter, due process was provided. Where the facts, as found by the trial court, have been found to be supported by substantial evidence, the appellate courts have affirmed the method of substituted service of process used. When the decision of the trial court was not

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[1] *Decher v. Gwinn*, 20 S.E. 240 (GA. 1894); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (Ill. 1907); *Williamson v. Taylor*, 122 S.E. 530 (W. Va. 1924); *John Hancock Mut. Life Ins. Co. v. Cooley*, 83 Pacific 2d 221 (Wash. 1938); *Holtberg v. Brommersbach*, 52 N.W. 766 (Minn. 1952); *Rash v. American Federation of Labor*, 116 N.W. 2d 175 (Minn. 1962); *Spiegelman v. Birch*, 129 S.E. 2d 119 (Va. 1963); *Gunning Light & Supply Co. v. Gunning Electric Co.*, 100 A. 2d 495 (Conn. 1963); *Houden v. Hubbell*, 80 N.M. 764 (1969); *Vann Tool Co. v. Grace*, 90 N.M. 544 (1977)

[2] *Nations v. Johnson*, 65 U.S. (24 How.) 628 (1861); *Earle v. McVeigh*, 91 U.S. 398 (1876); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Milliken v. Meyer*, 322 U.S. 457 (1940); *First National Bank & Trust Co. of Tulsa v. Ingerton*, 207 Fed 2d 793 (10th Cir. 1953).

supported by the evidence, the appellate courts have been quick to quash the service of process. The New Mexico Appellate Courts have been assiduous in enforcing due process requirements in interpreting and applying Rule 4 (e) (1), as it relates to substituted service of process.[3]

An analysis of New Mexico Supreme Court cases involving the issue of substituted service of process indicates that the Court has carefully examined the facts as found by the trial court and determined whether substantial evidence existed to support the lower court findings and conclusion,[4] while at the same time construing the New Mexico substituted service of process statute strictly.[5] In each case affirming the method of substituted service of process used[6] and in each case where substituted service of process was quashed,[7] the

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[3] *Spiegelberg v. Sullivan*, 1 N.M. 575 (1973) affirming substituted service of process; *Vigil v. Pradt*, 5 N.M. 161 (1889) quashing manner of substituted service; *Bell v. Gaylor* 6 N.M. (Gild.) 227 (1891) affirming manner of substituted service; *Household Finance Corporation v. McDevitt*, 84 N.M. 465 (1973) quashing manner of substituted service; *Federal Land Bank of Wichita v. Burgett*, filed June 13, 1977, and unreported, rehearing denied June 30, 1977, unreported, affirming method of substituted service of process; *Vann Tool Co. v. Grace*, 90 N.M. 544 (S. Ct. 1977) quashing manner of substituted service.

[4] Spura f.n.3.

[5] *Household Finance Corporation v. McDevitt*, supra.

[6] *Spielgelberg v. Sullivan*, supra, where defendant absconded and was avoiding service of process; *Bell v. Gaylor*, supra, where defendant absent from his home and premises; *Federal Land Bank of Wichita v. Burgett*, supra, the instant case.

[7] *Vigil v. Pradt*, supra, process posted on former residence of defen-

New Mexico Supreme Court decision has turned on (a) evidence that the process server made an actual determination that the defendant still lived in the premises; (b) the party defendant was only temporarily absent from the premises in which he lived; (c) the process server determined the most public part of the premises where the defendant lived, i.e. the most heavily used entrance to the house; (d) no one was present at the premises and house who was willing to accept the service of process; and (e) the return of service shows attachment was made to the "usual place of abode" of the defendant.[8]

The New Mexico Supreme Court has adopted its definition of "usual place of abode" from the West Virginia case of *Williamson v. Taylor*, 122 S. E. 530 (1924)[9] wherein the West Virginia court defined the term as follows:

> "Under the satute the usual place of abode' means customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid."

This definition was reaffirmed and quoted with approval by the New Mexico Supreme Court a few weeks following the disposition of this instant case before the

dant 50 miles from usual place of abode; *Houden v. Hubbell*, supra, improper identification of defendant as party to suit; *Household Finance Corporation v. McDevitt*, supra, defendant separated from husband and moved to another abode; *Vann Tool Co. v. Grace*, supra, where defendants had moved from house they still owned prior to service.

[8] Supra f.n. 6 and 7.

[9] *Household Finance Corporation v. McDevitt*, supra.

New Mexico Supreme Court in the case of *Vann Tool Co. v. Grace*, 90 N.M. 544 (S.Ct. 1977).

As each case in New Mexico relies on its own individual facts, nothing would be gained by having this Court review this particular case. A decision resting on substantial evidence is particularly inappropriate for this Court's consideration. No substantial question of importance exists as to the use of the New Mexico Rule and its application pursuant to the New Mexico Constitution and the United States Constitution.

Since the Petitioners are residents of the State of New Mexico, and this action was originally brought before the New Mexico courts on a foreclosure of mortgage on New Mexico real estate, New Mexico's constitution and laws must first be applied and interpreted. Application and intepretation of the New Mexico Constitution and laws should first be addressed by the New Mexico courts. On the question of proper substituted service of process, each state has traditionally been free to provide its own methods of substituted service of process on its own residents so long as those methods of substituted service of process comport with traditional notions of fair play and substantial justice.[10]

Each state may determine for itself what method of substituted service of process may be used within its own boundaries.[11] Each resident of the state is thus

[10] *Milliken v. Meyer*, 357 U.S. 457 (1943).

[11] *Blackmer v. United States*, 284 U.S. 421 (1932); *Milliken v. Meyer*, supra; *Bell v. Gaylord*, 6 N.M. 227 (1891); *Nelson v. Chicago, B. & Q. R. Co.*, 80 N.E. 109 (1907), where it was stated:

> It is also held that each state may determine for itself in what method process may be served upon its citizens within its own boundaries, and while such legislation will

bound to the laws of the state[12] and the methods of substituted service of process, provided those methods meet the tests of providing due process of law.[13]

Substituted service of process by posting on the door of the "usual place of abode" is reasonably calculated to give actual notice of the proceedings. The rule and its underlying reason was most succinctly stated in *Earle v. McVeigh*[14] wherein the court stated:

> "When the law provides that notice may be posted on the 'front door of the parties usual place of abode,'

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have no force outside the state, service of process, within the state in the manner pointed out in the statute regulating the method of obtaining such constructive service of process, if the method of service of process provided for is such to amount to due process of law, as these terms are used in the state and federal Constitutions, will be sufficient to authorize the courts of the state within whose jurisdiction the service of process is had to pronounce a personal judgment or decree against a defendant so served with process, although cases may arise in practice upon such constructive service of process where a personal judgment or decree might be obtained against a defendant without such defendant having received actual notice of the pendency of the action prior to judgment or decree. Constructive service of process, it is said, is authorized in a certain class of cases, such as when the defendant has gone out of the state, or when he cannot be found, or when he conceals himself, so that process cannot be served upon him, as the result of necessity; that is, such constructive service of process is substituted for actual service of process when actual service of process cannot be had upon a defendant.

[12] *Milliken v. Meyer*, supra.

[13] Nelson v. Chicago B. 0 Q.R. Co., supra.

[14] 91 U.S. 398 (1876)

> in the absence of the family, the intention evidently is that the person against who the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, 'the usual place of abode,' the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the door of his then present residence where the notice may be posted and constitute a compliance with the legal requirement."[15]

The trial court in this case did find that the service of process attached to the Burgetts' door was on the door of their "then present residence". Constitutional due process was accorded the Defendants in this case and is so accorded in New Mexico to all defendants served pursuant to Rule 4 (e) (1) of the New Mexico Rules of Civil Procedure.

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[15] 91 U.S. at 400.

CONCLUSION

Certiorari should not be granted because the questions presented in the Petition were not timely presented before the Courts of New Mexico. No federal question of importance has been presented since process was made in a manner most reasonably calculated to give notice of the law suit commenced. New Mexico can determine what is the most sutable method of substituted process for its residents where due process is provided.

Respectfully submitted,

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